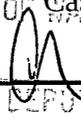


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DIVISION II

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STATE OF WASHINGTON Case No. 49263-6-II

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

Port of Tacoma, Economic Development Board for Tacoma-Pierce
County, Tacoma-Pierce County Chamber, City of Tacoma,

Respondents,

v.

Save Tacoma Water,

Appellant,

and

John and Jane Does 1-5 (Individual sponsors and officers of Save Tacoma
Water), Donna Walters, Sherry Bockwinkel, City of Tacoma, Julie
Anderson in her official capacity as Pierce County Auditor,

Defendants.

APPELLANT'S AMENDED¹ OPENING BRIEF

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March 21, 2017

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Table of Contents

Table of Authorities.....	iv
Introduction.....	1
Assignments of Error.....	3
Issues Pertaining to Assignments of Error.....	3
Statement of the Case.....	4
I. The people of Tacoma face an impending water shortage and sought to provide a democratic mechanism for significant water use decision-making through the People's Right to Water Protection initiatives.....	4
A. Wet Water versus Paper Water.....	6
B. The People's Right to Water Protection initiatives.....	7
Argument.....	9
I. Judicial veto power over citizen initiatives violates the people's right of local community self-government because it prevents the people from making laws to protect their rights, health, and safety.....	10
A. The right of local community self-government is a fundamental principle in legitimate systems of government.	10
1. Community self-government is the well-settled foundation of the American system of constitutional law.....	12
2. Community self-government was the foundation of the early American colonies.....	14
3. Community self-government is the foundation of legitimate government in American constitutional law.	16

4.	Denial of the right of community self-government was the cause of the American Revolution.....	17
5.	Community self-government is the foundation of the Declaration of Independence.....	18
6.	Community self-government is the foundation for state constitutions.....	20
7.	The U.S. Constitution guarantees the right of local community self-government.....	21
8.	The right of local community self-government is also guaranteed by the Washington Constitution.....	23
B.	In the mid Nineteenth Century, the courts ostensibly dispossessed the people of their inherent right of local community self-government.....	24
C.	Washington Constitution's Framers and early Amenders attempted to revive local community self-government through formal procedures for enacting local constitutions and for direct lawmaking by the people.....	26
II.	Judicial veto power over citizen initiatives violates core principles of separation of power and judicial restraint.....	30
III.	Judicial veto power over citizen initiatives is content-based discrimination of core political speech, without a compelling government interest, and thus it violates the peoples' rights enumerated in the federal First Amendment and Washington Constitution, Article I, Sections 4 and 5.....	33
A.	The Federal Constitution prohibits pre-enactment review of an initiative's content.....	33
B.	The Washington Constitution prohibits pre-enactment review of an initiative's content.....	37
IV.	This initiative is within the scope of the local initiative power because it does not conflict with state or federal law, does not exercise a power delegated to the city council, and is not administrative in nature.....	40

A.	The People's Right to Water Protection Initiatives are legislative, not administrative, because they create a new plan or policy.....	43
B.	The People's Right to Water Initiatives do not exercise a power statutorily-delegated to the City Council.....	44
C.	The initiatives do not conflict with state law.....	45
1.	RCW 43.20.260 only applies if there is a sufficient water supply, which is a tenuous assumption, and cannot be judged absent the facts from an actual water use application.....	45
2.	The initiatives do not conflict with state-mandated elements of Tacoma's Comprehensive Plan.....	46
3.	The initiative provisions protecting the People's Right to Water Protection from state law preemption may be protected by constitutional principles, such as the Public Trust Doctrine.....	46
4.	The initiative provisions protecting the People's Right to Water Protection from corporate "rights" do not conflict with state law when they distinguish between corporations and other persons.....	48
D.	The trial court had no authority to strike valid provisions of the initiative.....	49
	Conclusion.....	50
	Appendix A – Complete Text of Charter Amendment 5.....	52
	Appendix B – Complete Text of Tacoma Initiative 6.....	56

Table of Authorities

Cases

<i>Adult Entm't Ctr. v. Pierce Cnty.</i> , 57 Wn. App. 435, 788 P.2d 1102 (1990).....	48
<i>Am. Legion Post No. 149 v. Dept. of Health</i> , 164 Wn.2d 570, 192 P.3d 306 (2008).....	40
<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000).....	38
<i>Angle v. Miller</i> , 673 F.3d 1122 (9th Cir. 2012).....	34
<i>Ayers v. Tacoma</i> , 6 Wn.2d 545, 108 P.2d 348 (1940).....	42
<i>Brown v. Owen</i> , 165 Wn.2d 706, 206 P.3d 310 (2009).....	31
<i>Caminiti v. Boyle</i> , 107 Wn.2d 662, 732 P.2d 989 (1987).....	47
<i>City of Longview v. Wallin</i> , 174 Wn. App. 763, 301 P.3d 45 (2013).....	35
<i>City of Pasco v. Public Emps. Relations Comm'n</i> , 119 Wn.2d 504, 833 P.2d 381 (1992).....	40
<i>City of Port Angeles v. Our Water-Our Choice!</i> , 170 Wn.2d 1, 239 P.3d 589 (2010).....	44
<i>City of Seattle v. Auto Sheet Metal Workers Local 387</i> , 27 Wn. App. 669, 620 P.2d 119 (1980).....	40
<i>City of Seattle v. Sisley</i> , 164 Wn. App. 261, 263 P.3d 610 (2011).....	42
<i>City of Seattle v. Wright</i> , 72 Wn.2d 556, 433 P.2d 906 (1967).....	42
<i>Collier v. City of Tacoma</i> , 121 Wn.2d 737, 854 P.2d 1046 (1993).....	38-39
<i>Conger v. Pierce County</i> , 116 Wash. 27, 198 P. 377 (1921).....	13
<i>Coppernoll v. Reed</i> , 155 Wn.2d 290, 119 P.3d 318 (2005).....	32, 42
<i>Durocher v. King Cnty.</i> , 80 Wn.2d 139, 492 P.2d 547 (1972).....	44

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<i>Huff v. Wyman</i> , 184 Wn.2d 643, 361 P.3d 727 (2015).....	33
<i>Human Life of Wash. Inc. v. Brumsickle</i> , 624 F.3d 990 (9th Cir. 2010)....	41
<i>Hunter v. City of Pittsburgh</i> , 207 U.S. 161 (1907).....	25
<i>Indiana ex rel. Holt v. Denny</i> , 118 Ind. 449, 21 N.E. 274 (1889).....	11
<i>Internet Community & Entertainment Corp. v. Wash. State Gambling Comm.</i> , 169 Wn.2d 687, 238 P.3d 1163 (2010).....	10
<i>Juliana v. United States</i> , 2016 U.S. Dist. LEXIS 156014, 46 E.L.R. 20175, No. 6:15-cv-01517 (Or. D.C, Nov. 10, 2016).....	47
<i>League of Educ. Voters v. State</i> , 176 Wn.2d 808, 295 P.3d 743 (2013).....	33, 41
<i>Maleng v. King Cnty. Corr. Guild</i> , 150 Wn.2d 325, 76 P.3d 727 (2003)...	42
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803).....	22
<i>Martin v. Tollefson</i> , 24 Wn.2d 211, 163 P.2d 594 (1945).....	24
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<i>Mooney v. Holohan</i> , 294 U.S. 103 (1935).....	34
<i>Northwest Gas Ass'n v. Wash. Utilities and Transp. Comm.</i> , 141 Wn. App. 98, 168 P.3d 443 (2007).....	10
<i>Orion Corp. v. State</i> , 109 Wn.2d 621, 747 P.2d 1062 (1987).....	47
<i>Paramino Lumber Co. v. Marshall</i> , 27 F. Supp. 823 (W.D. Wash. 1939).	41
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<i>People v. Hurlbut</i> , 24 Mich. 44 (1871).....	25
<i>Poolman v. Langdon</i> , 94 Wash. 448, 162 P. 578 (1917).....	41

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<i>Robinson Twp. v. Pennsylvania</i> , 623 Pa. 564, 83 A.3d 901 (2013).....	47
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<i>Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Const.</i> , 185 Wn.2d 97, 369 P.3d 140 (2016).....	29, 32
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<i>State ex rel. Griffiths v. Super. Ct. in and for Thurston Cnty.</i> , 92 Wn. 44, 159 P. 101 (1916).....	30, 49
<i>State ex rel. Mullen v. Howell</i> , 107 Wash. 167, 181 P. 920 (1919).....	43
<i>State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.</i> , 135 Wn.2d 618, 957 P.2d 691 (1998).....	36
<i>State ex rel. Schillberg v. Everett Dist. Justice Ct.</i> , 92 Wn.2d 106, 594 P.2d 448 (1979).....	42
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	30
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<i>State v. Somerville</i> , 67 Wash. 638, 122 P. 324 (1912).....	41
<i>Taxpayers United for Assessment Cuts v. Austin</i> , 994 F.2d 291 (6th Cir. 1993).....	35
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<i>Washington State Grange v. Washington State Republican Party</i> , 552 U.S. 442 (2008).....	34
<i>Whatcom Cnty. v. Brisbane</i> , 125 Wn.2d 345, 884 P.2d 1326 (1994).....	44
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Constitutional Provisions

WASHINGTON CONSTITUTION Art. I, § 1.....	23
WASHINGTON CONSTITUTION Art. I, § 4.....	38
WASHINGTON CONSTITUTION Art. I, § 5.....	38
WASHINGTON CONSTITUTION Art. I, § 30.....	24
WASHINGTON CONSTITUTION Art. I, § 32.....	24
WASHINGTON CONSTITUTION Art. II, § 1.....	28
WASHINGTON CONSTITUTION Art. XI, § 10.....	27
WASHINGTON CONSTITUTION Art. XII, § 1.....	48
UNITED STATES CONSTITUTION, First Amendment.....	34-37
UNITED STATES CONSTITUTION, Ninth Amendment.....	22, 24
UNITED STATES CONSTITUTION, Fourteenth Amendment.....	33
THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776).....	13, 20-21, 24
CONSTITUTION OF DELAWARE (Sept. 21, 1776).....	20
CONSTITUTION OF GEORGIA (Feb. 5, 1777).....	20
CONSTITUTION OF MARYLAND (Nov. 11, 1776).....	21

Constitution of New Hampshire (Jan. 5, 1776).....	20
CONSTITUTION OF NEW JERSEY (July 2, 1776).....	20
CONSTITUTION OF NEW YORK (April 20, 1777).....	20
CONSTITUTION OF NORTH CAROLINA (Dec. 18, 1776).....	21
CONSTITUTION OF PENNSYLVANIA (Sept. 28, 1776).....	21
CONSTITUTION OF SOUTH CAROLINA (March 26, 1776).....	20
CONSTITUTION OF VERMONT (July 8, 1777).....	21
CONSTITUTION OF VIRGINIA (June 29, 1776).....	21
THE MECKLENBURGH RESOLUTIONS (May 20, 1775).....	19
THE ARTICLES OF CONFEDERATION OF THE UNITED COLONIES OF NEW ENGLAND (May 19, 1643).....	15
THE MAYFLOWER COMPACT.....	14

Statutes

RCW 35.22.200.....	29
Growth Management Act, RCW 36.70A.....	44
RCW 36.70A.070.....	46
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RCW 84.36.595.....	39
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UN Gen. Assembly resolution 64/292, July 28, 2010.....	47

Legislative History

1927 Wash. Sess. Laws 41, ch. 52.....	29
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Introduction

Over one hundred years ago, the people of charter cities in Washington formalized their power of direct lawmaking through the initiative process. They did this before the people of Washington State amended the state Constitution to reserve the state-wide initiative power. The people created the initiative process because they were concerned that their elected officials would not enact laws to protect the people's rights, health, and safety. The people chose the signature petition as the threshold criteria to decide which initiatives go onto the ballot.

But almost from the beginning of the people's exercise of direct democracy through the initiative, the courts gave themselves the power to police which initiatives go onto the ballot. This judicial veto power has now expanded to the point where a judge can prevent an initiative from going onto the ballot for almost any reason, even using hypothetical facts to support that veto.

In Tacoma in 2016, the grassroots community group Save Tacoma Water proposed The People's Right to Water Protection initiatives (one initiative to enact an ordinance would appear on the 2016 ballot, and one initiative to amend the City Charter would appear on the 2017 ballot). With all volunteers, Save Tacoma Water collected nearly 17,000 signatures. The initiatives proposed protecting the Tacoma water supply

from large industrial uses that did not further the sustainable use of Tacoma Water by requiring large new water use applicants to pass a majority vote of the people of Tacoma in addition to the other application requirements to receive Tacoma Water. The full text of the initiatives is included as appendices to this Brief, and in Clerk's Papers at 28 and 31.

The Port of Tacoma, Economic Development Board for Tacoma-Pierce County, Tacoma-Pierce County Chamber, and City of Tacoma, sued Save Tacoma Water in Pierce County Superior Court, asking the judge to veto the initiatives to prevent the people from voting on them. The trial court summarily agreed and struck the initiatives from appearing on the ballot.

In doing so, the court violated the people's right of local community self-government – the people's inherent political power to create laws to protect their rights, health, and safety. In addition, the court violated separation of powers by ruling on the validity of proposed legislation before it had been enacted into law. Further, the court's order is content-based discrimination against core political speech, which is unconstitutional under both the federal and state constitutions absent a compelling government interest and narrowly-tailored remedy.

Finally, regardless of those fundamental flaws in the court's decision, the trial court was simply wrong about whether the initiative is “beyond the scope of the initiative power.”

Assignments of Error

1. The trial court erred by denying Save Tacoma Water's Motion to Dismiss for Lack of Subject Matter Jurisdiction, when the trial court ruled that issuing a judicial veto did not violate the people's core political rights, including their right of local community self-government, and their speech and petition rights, and also in ruling that separation of powers did not prevent the court from judging the validity of proposed legislation.
2. The trial court erred by granting Plaintiffs' and the City's Motions for Preliminary and Permanent Injunctions, when the initiatives enjoined from appearing on the ballot were within the scope of the people of Tacoma's initiative power.

Issues Pertaining to Assignments of Error

- A. Do the people of Tacoma possess an inviolable right of local community self-government, through which they have the political power to enact laws to protect their rights, health, and safety?
(Assignment of Error 1.)
- B. Did the court violate the people's right of local community self-government when it prevent the people from voting on duly-qualified citizen initiatives? (Assignment of Error 1.)
- C. Did the court violate separation of powers when it ruled on the

- legality of a proposed law? (Assignment of Error 1.)
- D. Did the court violate the First Amendment when it enjoined initiatives from appearing on the ballot based entirely on the content of the proposed laws? (Assignment of Error 1.)
- E. Did the court violate Washington Constitution Article I, Sections 4 and/or 5, when it enjoined initiatives from appearing on the ballot based entirely on the content of the proposed laws? (Assignment of Error 1.)
- F. Should the court follow established statutory construction rules when it evaluates the legality of laws proposed by initiative? (Assignment of Error 2.)
- G. Is an initiative that proposes a popular vote on significant water use applications in the City of Tacoma within the scope of the people's local initiative power? (Assignment of Error 2.)

Statement of the Case

- I. The people of Tacoma face an impending water shortage and sought to provide a democratic mechanism for significant water use decision-making through the People's Right to Water Protection initiatives.**

In 2015, due to drought conditions, the City of Tacoma encouraged water conservation, and considered banning some beneficial uses by residents and buying extra water from adjacent water suppliers. CP 561. The City did not, however, ration use for large industries. *Id.*

Demand for water is increasing. Tacoma's population is projected to increase by 127,000 additional residents by 2040. *Id.* The surrounding cities that get their water through Tacoma's water system are projected to increase by an additional 200,000 people. *Id.* The models that show no water crisis for the Puget Sound region are based on tenuous assumptions: "If demographic growth projections became greater than forecasted, there could be shortages of as much as 100 million gallons per day in 2060 if no supply improvements are constructed or new supplies brought on line." *Id.*

On the supply side, there are also issues. 2015 was a drought year – an outlier based on the climatic norms of the past. *Id.* But due to climate change, by 2075, models show Tacoma will have experienced a prolonged decline in its water supply of 4 to 8 percent. CP 561-62. In other words, Tacoma must not only plan for increasing water demand, but also for decreasing water supply. CP 562. Further, the water supply from the Green River – which the conservation group American Rivers "listed" as one of America's most endangered rivers – must also support anadromous salmon and an aquatic ecosystem, which increases the legal uncertainty of Tacoma's water supply. *Id.* In 2015, Tacoma did not have enough water. *Id.* In 60 years, the normal supply will be less and the demand will be more. *Id.* Thus, difficult choices lie ahead, and development decisions that lock-in large water uses foreclose other development paths. *Id.*

significant amount of a limited (and over-allocated) water supply to a single large industrial user has a direct impact on the water available for the people of Tacoma, for the people of adjacent cities, and for other present and future commercial and industrial uses. CP 563.

B. The People's Right to Water Protection initiatives

The grassroots activists in Save Tacoma Water recognized this impending water crisis, and proposed – as a partial solution – the policy that the people of Tacoma should have a say in decisions that irrevocably commit the community to a particular development trajectory. *Id.* Save Tacoma Water circulated two initiative petitions – one to enact an ordinance and another to amend the City Charter – and in 100 days, with all volunteers, they collected nearly 17,000 signatures. CP 585, ¶ 14.

Both initiatives imposed an additional requirement on large water user applicants to Tacoma Water (those applicants seeking to use over 1 mgd – there is currently only one such water user). CP 28, 31. In addition to the existing procedure for Tacoma Water deciding whether to supply water to a new water applicant, for large water use applicants the voters of Tacoma would have to approve the applicant with a majority vote. *Id.* The initiatives recognized that elected officials could not be trusted to make these decisions in the best long-term interest of the people of Tacoma (as the methanol plant proposal had aptly demonstrated), and that a

sustainable water system was an essential right, and necessary for the people's "life, liberty, and happiness." *Id.*

Prior to Save Tacoma Water's well-publicized petition signature turn-in date of June 15th, 2016, the Port, Chamber, and EDB brought this lawsuit in Pierce County Superior Court asking the court to strike the initiatives from the ballot. CP 563, 1. Two days later, the City joined the Plaintiffs. CP 32. Save Tacoma Water's volunteer signature gatherers ran for cover, afraid that they would be named as one of the "John Doe" Defendants and be individually sued simply for exercising their political rights. CP 585-86, ¶¶ 19-27. Save Tacoma Water subsequently submitted signature petitions on the ordinance initiative, which the County Auditor verified as having sufficient valid signatures. CP 563.

The Plaintiffs acknowledged that this case is actually a political campaign brought into the courthouse, as the local daily paper reported:

All three [Plaintiff] organizations say both issues would chill economic development in the county if they are allowed to go to a public vote, whether or not they passed.

"The fact that it's illegal and unconstitutional is, from our perspective, almost beside the point," said EDB CEO Bruce Kendall. "If this passes or comes close to passing, what's next? What else are we going to have public votes on?"

CP 564. The political nature of this case was not lost on the public. *Id.*

Another journalist commented that "Anti-business interests are blamed

whenever the Chamber of Commerce feels its investment schemes may have to be scrutinized. Accordingly, it is the danger of a stifled business environment – not the legal case – that is given the most shrift in [Plaintiffs'] media publicity against the initiative.” *Id.* Another citizen filed complaints to the Public Disclosure Commission that the Port is now illegally using government resources to oppose ballot measures. *Id.*

Plaintiffs and the City filed preliminary injunction motions, requesting permanent injunction too. CP 175-93; 318-64; 516-29. At the July 1st, 2016, preliminary injunction hearing, the trial court denied Save Tacoma Water’s motion to dismiss and issued a permanent injunction. CP 672-78 and RP 53:5-56:11.

Argument

To affirm the trial court, this Court must find that (1) the people of Tacoma have no right of local community self-government, (2) the courts do not violate the people’s core political rights (under both the First Amendment, and Article I, Sections 4 and 5) when the courts veto citizen initiatives based on the initiative content, (3) the courts do not violate separation of powers when issuing judicial vetoes of proposed legislation, and (4) this initiative did not pass the judicial veto test. Finding for Save Tacoma Water on any one of these arguments requires reversal of the trial court decision. All of these issues are reviewed *de novo*. *E.g., Internet*

Community & Entertainment Corp. v. Wash. State Gambling Comm., 169 Wn.2d 687, 238 P.3d 1163 (2010); *Northwest Gas Ass'n v. Wash. Utilities and Transp. Comm.*, 141 Wn. App. 98, 168 P.3d 443 (2007).

I. Judicial veto power over citizen initiatives violates the people's right of local community self-government because it prevents the people from making laws to protect their rights, health, and safety.

“If a state standard-setting or regulatory law was considered to determine both the ceiling as well as the floor for regulation, there would be no space for local regulation once the state had acted.”

Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URBAN LAWYER 253, 264-65 (2004).

Initiative lawmaking is foundational to exercising the people's right of local community self-government. Here, the people of Tacoma initiated an amendment to their local constitution to recognize greater human rights and ecological rights protections for their water supply. The Court denied the people their right to even consider that proposed change, and thus denied their right of local community self-government, one of their fundamental political rights.

A. The right of local community self-government is a fundamental principle in legitimate systems of government.

The life of the law has not been logic: it has been experience. . . . The law embodies the story of a nation's development through many centuries In order to know what it is, we must know what it has been, and what it tends to become. We must alternatively *consult history* and existing

theories of legislation. . . . The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

Oliver Wendell Holmes, *THE COMMON LAW* 1-2 (1909) (emphasis added).

The law – both express, and embedded in our history – shows that a right of local community self-government has been a fundamental tenet of American law, both in theory and practice, until it was stripped from the people by the courts. If it was once convenient to forget this right, it is no longer so.

The people of Tacoma's natural, inherent, and inalienable right of local community self-government is embedded in, and secured by, our constitutional structure. *E.g.*, *Indiana ex rel. Holt v. Denny*, 118 Ind. 449, 457-75, 21 N.E. 274 (1889) (“the right of local self-government in towns and cities of this State is vested in the people of the respective municipalities”).² It is secured by the history of the founding of the United States, the American Declaration of Independence, the U.S. Constitution, and the Washington Constitution.

² “It is well-known that the delegates to the Washington Convention borrowed heavily from the constitutions of other states. The Washington Declaration of Rights, for example, was largely based on W. Lair Hill's proposed constitution and its model, the Oregon Constitution. The Oregon Constitution in turn borrowed heavily from the Indiana Constitution.” Robert F. Utter & Hugh D. Spitzer, *THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE* 9 (2002) (citation omitted).

1. Community self-government is the well-settled foundation of the American system of constitutional law.

A right is fundamental when “it is deeply rooted in this nation's history and tradition.” *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Brennan, J., concurring). The right of community self-governance is one of those deeply rooted rights. Communities in the early American colonies were founded on the people's authority to govern themselves. From the Mayflower Compact to the American Revolution and the ratification of the United States Constitution, no principle has been more seminal than that of the people's inherent political power, and no right more fundamental than the right of local community self-government.

The colonists' struggle against British rule illustrates how community self-government took shape as the foundation of the American system of constitutional law. The colonists' efforts culminated in the Declaration of Independence, which codified the principles of local community self-government that had been forged by American settlements since the 1600s. In adopting the Declaration of Independence in 1776, the Second Continental Congress made clear that any government's power originates from the people, and that the people have the right to alter their system of government to protect their “Life, Liberty . . . Safety and Happiness”:

We hold these truths to be self-evident, that all men [*sic*] are

created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men [*sic*], *deriving their just powers from the consent of the governed*, — *That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*

THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776) (emphasis added).

Following this statement of legal first principles, the Declaration enumerated the people's first grievance against the British Empire: “He has refused his Assent to Laws, the most wholesome and necessary for the public Good.” *Id.* ¶ 3. This violation of self-government justified severance from British rule. Since there were neither states, nor a national government at the time, the grievance constitutes a complaint against the denial of the colonists' inherent right of local community self-government. *See Conger v. Pierce County*, 116 Wash. 27, 35, 198 P. 377 (1921) (“It is probable that this power is the most exalted attribute of government, and, like the power of eminent domain, it existed before and independently of constitutions.”).

2. Community self-government was the foundation of the early American colonies.

The concept of community self-government in America³ dates back to the Mayflower Compact, adopted in 1620, over a hundred and fifty years before Thomas Jefferson codified the principles of community self-government in the national Declaration of Independence. The Mayflower Compact was the first constitution of its kind to be written by the American colonists, and it set the stage for an understanding of government that represented a dramatic departure from European rule. In one paragraph, the colonists dismantled the old system of government – based on royal authority – and forged a new one based purely on the political sovereignty of the people themselves. They declared:

We . . . covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid: And by Virtue hereof to enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony⁴

Far from being unusual, such early American concepts of

3 We are tracing the Anglo-American history (not the indigenous political history) of this deeply rooted right, as that is the political history of our legal structure. We are also using “the people” in the inclusive and broad ideal used today, not the narrower application from the past where “the people” was effectively synonymous with the One Percent. *See, e.g.*, Terry Bouton, *TAMING DEMOCRACY: “THE PEOPLE,” THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION* 4 (2007) (citations omitted) (“To see the Revolution as a democratic victory for the people, one has to cut most of the people out of the story.”).

4 *THE MAYFLOWER COMPACT*, in Kermit L. Hall et al., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* 14 (3rd ed. 2005).

community self-government were the norm: the people possessed the innate authority to create, control, and change their own governing systems locally. COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 3 (Lutz ed., 1998). When the people of various towns and colonies joined together in confederations, they retained “exclusive jurisdiction and government within their limits,” thereby securing their authority to self-govern locally.⁵

Judge McQuillin, author of the seminal treatise on the law of municipal corporations, explained that those communities constituted “miniature commonwealths [with] the solid foundation of that well-compacted structure of self-government.” McQuillin, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS, Vol. 1, at 144 (1911). “In this country from the beginning, political power has been exercised by citizens of the various local communities as local communities, and this constitutes the most important feature in our system of government.” *Id.* at 152. Thus, the early American colonies were replete with constitutions, compacts, and agreements reflecting that emergent self-organizing American form of government, one in which the people of those communities possessed the unabridged right to create, control, and change their systems of

5 See, e.g., THE ARTICLES OF CONFEDERATION OF THE UNITED COLONIES OF NEW ENGLAND (May 19, 1643), available at avalon.law.yale.edu/17th_century/art1613.asp.

governance. “[T]he people of the various organized communities exercise their rights of local self-government under the protection of these fundamental principles which were accepted, without doubt or question” *Id.* at 384-85.

3. Community self-government is the foundation of legitimate government in American constitutional law.

While Great Britain tolerated the colonists' self-rule in the interests of efficiency, it believed that final authority over governing matters lie with the British king and parliament. Clashes between these two theories of government – of the right of the American people to create, manage, and alter their systems of government as they saw fit; and the “right” of the British government to manage the colonies – were commonplace in the period leading up to the American Revolution. Miller, *ORIGINS OF THE AMERICAN REVOLUTION* 38 (1962). Such clashes led to the development of the doctrine of community self-government as constitutional law.

In 1760, colonial lawyer James Otis, Jr. first used the right of community self-government as a constitutional doctrine when he represented colonial merchants in a direct challenge to Great Britain's authority to adopt “writs of assistance.” *Id.* at 46. The writs allowed British authorities to enter any colonist's residence without advance notice or probable cause. Otis argued that the writs were invalid because they had

been adopted only by the British parliament, and not by the people of the colonies. Otis' thesis – that the people themselves were the only rightful lawmaking authority – was the first articulation of community self-government as a legal and constitutional doctrine in the colonial context. Beach, *SAMUEL ADAMS: THE FATEFUL YEARS 1764-1776*, at 55 (1965). The right of community self-government (including the right to alter any system of governance that undermines that right) formed the heart of the patriots' struggle. See *THE FOUNDERS' CONSTITUTION*, Vol. 1, Ch. 13, Doc. 4 (Kurland & Lerner eds., 1987).

4. Denial of the right of community self-government was the cause of the American Revolution.

The British Parliament retaliated against colonists' self-governance by enacting the “American Colonies Act,” which rejected the colonists' authority to self-govern locally. It proclaimed that Parliament “had hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America . . . in all cases whatsoever.” Maier, *FROM RESISTANCE TO REVOLUTION* 145 (1972). In response, the colonists attacked the Act as “inconsistent with the natural, constitutional and charter rights and privileges of the inhabitants of this colony.” Marc Kruman, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 12 (1997).

In 1774, in response to growing unrest, Parliament enacted the Massachusetts Government Act, designed to displace the various legislative mechanisms of local self-government by expanding the royal governor's powers. British officials believed that their inability to control the people of Massachusetts was directly attributable to the highly independent nature of its local governments and the operation of the Town Meeting at the community level. The Act required that each "agenda item at every town meeting in Massachusetts . . . be submitted in writing to the governor and meet with his approval No meeting could be called without the prior consent of the governor." Ray Raphael, *THE FIRST AMERICAN REVOLUTION: BEFORE LEXINGTON AND CONCORD* 50 (2002). As Lord North explained to Parliament, the purpose of the Act was "to take the executive power from the hands of the democratic part of government." Christie & Labaree, *EMPIRE OR INDEPENDENCE, 1760-1776*, at 188 (1976). The royal governor eventually used the Act to dissolve the Massachusetts Assembly completely.

5. Community self-government is the foundation of the Declaration of Independence.

Beginning in 1773, in response to those royal assertions of power and nullification of community self-governance, the people of ninety towns, villages, and counties across the thirteen colonies began to issue their own local declarations of independence. Declaring that only their

own homegrown, democratically-elected governments could “constitutionally make any laws or regulations,” those communities proclaimed their own independence from British rule years before Congress issued a national Declaration of Independence. Maier, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 48-49 (1997). The Charlotte Town Resolves, for example, declared in May 1775, over a year before the national declaration, that “all laws derived from the authority of the King or Parliament are annulled and vacated.”⁶

This fundamental principle of local self-government was recognized and reasserted by Congress in June 1776, when it issued the national Declaration of Independence. The Declaration codified the principles of local self-government that had been forged by the American colonists starting in the 1600s onward. Drawing on the declarations of towns, villages, colonies, compacts, early constitutions, and the writings of James Otis and others, the Declaration reaffirmed four major principles of law:

- First, certain rights – those of life, liberty, safety, and the pursuit of happiness – are natural rights, held by virtue of being human⁷;
- Second, the people create governments to secure those natural

6 THE MECKLENBURGH RESOLUTIONS (May 20, 1775), *available at* avalon.law.yale.edu/18th_century/nc06.asp.

7 THE DECLARATION OF INDEPENDENCE ¶ 2 (“That all men [*sic*] . . . are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.”).

rights⁸;

- Third, each government owes its existence to, and derives its power exclusively from, the community that creates it⁹; and
- Fourth, when government becomes destructive of the people's natural rights, the people have a right (and duty) to alter or abolish that government and establish new forms.¹⁰

The Declaration of Independence has been congressionally recognized as an organic, enforceable law of the United States, and is part of the United States Code. *See* 1 U.S.C. at i-iii.

6. Community self-government is the foundation for state constitutions.

The Constitutions adopted by the people of the colonies – transforming the colonies from chartered corporations into sovereign states – reaffirmed and codified, as the basis for those state governments, the four principles of community self-government in the Declaration.¹¹

8 *Id.* (“that, to secure these rights, governments are instituted among men [sic]”).

9 *Id.* (“deriving their just powers from the consent of the governed”).

10 *Id.* (“whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness . . . it is their right, it is their duty, to throw off such government”).

11 The people of two states, New York and Connecticut, adopted the text of the Declaration directly into their state constitutions; the people of eight states adopted a Declaration of Rights that restated the four principles of the Declaration; and the people of four states, New Jersey, Georgia, South Carolina, and New Hampshire, included the principles of the Declaration in the text of the preamble to their state constitutions. *See* CONSTITUTION OF NEW YORK (April 20, 1777); CONSTITUTION OF NEW JERSEY (July 2, 1776); CONSTITUTION OF GEORGIA (Feb. 5, 1777); CONSTITUTION OF SOUTH CAROLINA (March 26, 1776); CONSTITUTION OF NEW HAMPSHIRE (Jan. 5, 1776); CONSTITUTION OF DELAWARE (Sept. 21, 1776);

In addition to being expressly secured by state constitutions, the right of community self-government was embodied in the process by which the people of each state drafted and adopted their constitutions. All but one of the thirteen original colonies entrusted the responsibility of drafting new constitutions to the people themselves through constitutional conventions, rather than through permanent state legislatures. See Marc Kruman, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 157-58* (1997).

7. **The U.S. Constitution guarantees the right of local community self-government.**

The framers debated whether to explicitly insert all four principles of the Declaration of Independence directly into the United States Constitution's preamble, or whether the people's right of self-government was so fundamental that it need not be expressly stated in the text of the Constitution itself. Advocating for express inclusion, James Madison argued that even though the truth of those principles were so self-evident that they could not be denied, and even though they were already in the state Constitutions, they should also be inserted in the federal Constitution.¹²

CONSTITUTION OF MARYLAND (Nov. 11, 1776); CONSTITUTION OF NORTH CAROLINA (Dec. 18, 1776); CONSTITUTION OF PENNSYLVANIA (Sept. 28, 1776); CONSTITUTION OF VIRGINIA (June 29, 1776); CONSTITUTION OF VERMONT (July 8, 1777), available at avalon.law.yale.edu/subject_menus/18th.asp.

12 U.S. House of Representatives, June 8, 1789, available at teachingamericanhistory.org/bor/madison_17890608/.

The House rejected the addition, significantly because it deemed the language already incorporated in the Constitution's preamble. Roger Sherman explained that since

this right is indefeasible, and the people have recognized it in practice, the truth is better asserted than it can be by any words whatever. The words "We the people," in the original Constitution, are as copious and expressive as possible; any addition will only drag out the sentence without illuminating it¹³

Fourteen years later, the U.S. Supreme Court, in *Marbury v. Madison*, 5 U.S. 137 (1803), validated Sherman's reasoning. Interpreting the Constitution's preamble as recognizing the people's inherent and fundamental right of self-government, the Court concluded: "That the people have an original right to establish, for their future government, such principles as, in their own opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected." *Id.* at 176.

The right of local community self-government, as a fundamental right, is also protected by the Ninth Amendment of the Bill of Rights. That Amendment says "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other rights retained by the people." As the concurrence in *Griswold* explained: "The language and

¹³ U.S. House of Representatives, August 14, 1789, *available at* teachingamericanhistory.org/bor/select-committee-report/.

history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, [in addition to] those fundamental rights specifically mentioned in the first eight constitutional amendments.” 381 U.S. at 488.

Historical evidence uncovered in the last twenty-five years reinforces that the public intent of this amendment was to elevate the natural rights of people – rights that pre-existed the Constitution – to the same status, whether or not the rights were explicitly enumerated in the Bill of Rights. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 28-29 (2006). These pre-existing natural rights include individual rights as well as collective rights. *Id.* at 20-21, 46.

The right to local self-government is a right retained by all people and can be exercised in whatever political direction the people please. What we have forgotten, what we have lost, is that the right to local self-government is more than an idea. It is a right enshrined in the Constitution itself.

Kurt Lash, *THE LOST HISTORY OF THE NINTH AMENDMENT* 360 (2009).

8. The right of local community self-government is also guaranteed by the Washington Constitution.

The right of local community self-government is expressed in Washington Constitution Article I, Section 1 (“All political power is inherent in the people, and governments derive their just powers from the

consent of the governed, and are established to protect and maintain individual rights.”),¹⁴ Section 30 (“The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.”), and Section 32 (“A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.”). These provisions mirror the Declaration of Independence and federal Ninth Amendment.¹⁵

Accordingly, the people of Tacoma possess an inherent, federal and state guaranteed right of local community self-government, secured by the Declaration of Independence, the Washington Constitution, and the United States Constitution.

B. In the mid Nineteenth Century, the courts ostensibly dispossessed the people of their inherent right of local community self-government.

Writing back in 1835, Alexis de Tocqueville said the courts held “repugnance to the actions of the multitude, and . . . secret contempt of the government of the people.” Kermit L. Hall *et al.*, *American Legal History: Cases and Materials* 353 (3d ed. 2005). Not surprisingly then, the courts attacked the people's right of local community self-government. By the

¹⁴ *Martin v. Tollefson*, 24 Wn.2d 211, 216, 163 P.2d 594 (1945) (“The people, under our system of government, are the source of all governmental power, and they adopted the constitution for the purpose of creating certain agencies through which that power should be exercised.”).

¹⁵ See also Washington Enabling Act, ch. 180, 25 Stat. 676 (1889) (requiring the state constitution to “not be repugnant to the Constitution of the United States *and the principles of the Declaration of Independence*” (emphasis added)).

mid Nineteenth Century, “Dillon's Rule” provided a competing theory of governance. Dillon's Rule – named after Judge John Forest Dillon, who served on the Iowa Supreme Court and the federal Second Circuit before moving up to become lead counsel for a railroad corporation – argued that the state holds plenary power over the people and all local governance is merely a revocable gift from the state legislature. *See generally, e.g.,* Hugh Spitzer, “Home Rule” vs. “Dillon's Rule” for Washington Cities, 38 SEATTLE U. L. REV. 809 (2015); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1113-15 (1980). By the early Twentieth Century, and in response to populist and progressive challenges to corporate power, the United States Supreme Court enshrined Dillon's Rule as the law of the land in order to suppress democratic reforms against the corporate state. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).¹⁶

However, this judicial attack on the right of local community self-government has not been consistent. Leading Nineteenth Century judicial theorists like McQuillin and Cooley opposed Dillon's Rule's nullification of community self-government. *E.g., supra* at 15-16; *People v. Hurlbut*, 24 Mich. 44 (1871); David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999).

¹⁶ Where Dillon's Rule leads us is best illustrated today by the Flint water crisis, which appears to have been caused by the appointment of an unelected municipal government under Michigan's controversial “Emergency Manager” law. 2012 Mich. Pub. Act 436. Like the British Parliament's 1774 Massachusetts Government Act, the Emergency Manager law allows the state to abolish locally-elected governments.

Even the United States Supreme Court had at one time recognized that local constitutions (home rule charters) provided protections that were immune from state law preemption. *St. Louis v. Western Union Telegraph Co.*, 149 U.S. 465 (1893) (rejecting arguments by John Forest Dillon).

But Dillon's Rule – with its appeal to the judiciary's “repugnance to the actions of the multitude, and . . . secret contempt of the government of the people” has generally won out over the people's inherent democratic right of local community self-government. This is so even though, in Washington law, Dillon's rule is a judicially-fabricated theory that has no *stare decisis* power, nor textual origin, but yet it continues to emerge as “zombie jurisprudence” in opinions where the Court is reaching for a theory to support a particular outcome. Hugh Spitzer, “*Home Rule*” vs. “*Dillon's Rule*” for *Washington Cities*, 38 SEATTLE U. L. REV. 809, 858-60 (2015). The Supreme Court of Utah recognized Dillon's Rule's flaws and unequivocally abolished it in 1980. *Utah v. Hutchinson*, 624 P.2d 1116, 1118-20 (Utah 1980). For the sake of democracy, it is time for this Court to do the same.

C. Washington Constitution's Framers and early Amenders attempted to revive local community self-government through formal procedures for enacting local constitutions and for direct lawmaking by the people.

Home rule would create a city republic, a new sort of sovereignty, a republic like unto those of Athens, Rome, and the mediæval Italian cities, a republic related to the state as the

states are now related to the nation at large. . . . This agitation for home rule is but part of a larger movement. It is more than a cry for charter reform; more even than a revolt against the misuse of the municipality by the legislature. It partakes in a struggle for liberty, and its aim is the enlargement of democracy and a substitution of simpler conditions of government. It is a demand on the part of the people to be trusted, and to be endowed with the privileges of which they have been dispossessed.

Frederic C. Howe, *THE CITY: THE HOPE OF DEMOCRACY* 164, 167-68 (1905).

In addition to the Article I provisions that implicitly recognize the right of local community self-government, *see supra* at 23-24, Washington's Constitution formalized the process of enacting local constitutions. CONST. art. XI, § 10. The people of Washington adopted these constitutional provisions due to well-founded concerns over corporate power controlling the legislature, and thus controlling local lawmaking through Dillon's Rule.¹⁷

The growth of power, and the arrogant disregard of laws and the rights of the people, by corporations made the question of limiting corporate power one of the most vital and earnestly discussed questions before the constitutional convention. The members were keenly awake to the situation, and knew that the growth and menacing attitude of this unscrupulous power must be curbed in some way.

Lebbeus J. Knapp, *The Origin of the Constitution of the State of*

¹⁷ "All of the home rulers opposed the state creature idea of local power." David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2324 (2003).

Washington, 4 WASH. HIST. Q. 227, 239 (1913).¹⁸

At the beginning of the twentieth century, still concerned with the danger of corporate control over the political branches of government, the people reclaimed their direct lawmaking powers in charter cities and statewide.¹⁹ In 1909, the people of the City of Tacoma amended their Charter to include direct democracy procedures for the exercise of their initiative power. They did this three years before the amendment to the Washington Constitution that established the state-wide initiative procedure. *Compare* CP 578-82 (Tacoma initiative power in 1909) *with* CONST. art. II, § 1 (where the people approved Amendment 7 – the people's reservation of the initiative power – in November 1912).

Instead of recognizing that the local initiative power derives from the people's right of local community self-government and predated the state-wide initiative amendment, the Washington Supreme Court revived the “zombie jurisprudence” of Dillon's Rule in order to hold that the state

18 *See also id.* at 247 (“None of the members [of the Constitutional Convention] favored a very small house, for the reason, as they expressed it, that there would be sdanger of corporate control.”), 249 (“The attempts and success of great corporations in influencing legislation, and the administration of laws at the period of the state convention is well known.”), *available at* lib.law.washington.edu/waconst/Sources/Knapp.pdf.

19 Claudius O. Johnson, *The Adoption of the Initiative and Referendum in Washington*, 35 PAC. NW. Q. 291, 294 (1944) (“Washington had had ample experience with old-time machine politicians who were dominated, often bought, by the railroad companies and other corporate interests. It had been found impossible, for example, to get the legislature to enact a statute creating a railroad commission.”), 303 (“[T]he movement for direct legislation in Washington . . . was part and parcel of a general reform program for restoring government to the people.”), *available at* lib.law.washington.edu/waconst/Sources/Johnson.pdf.

gave the people their local initiative power in a 1927 statute. *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Const.*, 185 Wn.2d 97, 104, 369 P.3d 140 (2016); RCW 35.22.200; *see also* 1927 Wash. Sess. Laws 41, ch. 52. This interpretation completely contradicts the history of the initiative power, which the people of the major cities of Washington had already formalized around 1909. A 1927 statute could not have authorized those actions that occurred nearly two decades earlier – rather, the people's inherent right of local community self-government did.

The people formalized local constitution-making and the initiative power to check corporate power: to ensure that the people could democratically create positive social change through lawmaking even if corporations controlled their elected legislative (and judicial) bodies.

This case, then, exemplifies the people's use of the initiative. Here, the Tacoma Charter amendment proposed by a volunteer grassroots citizen group is opposed by the Port of Tacoma, the City of Tacoma, and the nonprofit business lobbies Chamber and Economic Development Board. Save Tacoma Water's members saw how easily a large industrial water user applicant could get support by local and state elected officials for a proposal – the methanol plant – that the people clearly rejected. The Plaintiffs and City brought this case to prevent the people of Tacoma from reforming their system of government to protect their rights, health, and

safety. The people sought to democratically protect their water, and the trial court held that it was illegal for them to even propose the policy.

In the 1900's, the people intended their initiative power to be a popular check on corporate control of the lawmaking process. This fundamental purpose is thwarted when corporate interests can easily divert an initiative from the ballot through a judicial veto, as happened here. This Court must hold that the people's initiative power in charter cities derives from their inherent right of local community self-government – it is not a gift from the state legislature – and the courts lack jurisdiction to veto the people's proposed legislation.²⁰

II. Judicial veto power over citizen initiatives violates core principles of separation of power and judicial restraint.

The Court should abide by the established justiciability rules and recognize that it has no authority to interfere with proposed legislation.

“With the ultimate question of the validity of this proposed legislation we have no present concern. Courts will not determine such questions as to contemplated legislation which may, perchance, never be enacted.” *State ex rel. Griffiths v. Super. Ct. in and for Thurston Cnty.*, 92 Wn. 44, 47, 159

²⁰ In legal academic terms, this argument requires the Court to consider the merger of new judicial federalism with home rule theory: if state constitutions can recognize human rights and ecological rights that go above the federal floor, then why can't local constitutions recognize more protective human rights and ecological rights than the state provides? *See, e.g.*, RP 50:2-51:16; William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *State v. Gunwall*, 106 Wn.2d 54, 65-66, 720 P.2d 808 (1986).

P. 101 (1916). This remains the general rule. *Brown v. Owen*, 165 Wn.2d 706, 720, 206 P.3d 310 (2009) (citation omitted) (“The right of a legislative body to exercise its legislative powers will not be invaded by the judicial branch of government.”). This rule applies even for *local* decisions by the people. *Minish v. Hanson*, 64 Wn.2d 113, 115, 390 P.2d 704 (1964) (holding that “it is the rule in this state that the courts will not enjoin proposed legislative action,” where the legislative action in question would be decided by a vote of the people of a water district).

Unfortunately, Washington courts have also entertained a line of cases that purport that the courts can interfere with proposed legislation by *the people*. This judicial veto began shortly after the people formalized their direct democracy powers, and the court's “repugnance to the actions of the multitude, and . . . secret contempt of the government of the people” was evident in the first holding in 1916:

During the last 40 years of the Nineteenth Century there arose and grew in democratic republics and commonwealths a powerful distrust and dislike of their parliaments. They became tired of the representative system. In the latter part of that period the people of the democracies submitted to their representative Legislatures only under the pressure of stern necessity. The growing distrust and contempt for legislative bodies, municipal, state, and federal, and the tendency to restrict them, culminated, with the beginning of this century in numerous returns by states to *the primitive system of direct legislation*, modified by modern systems of election.

State ex rel. Berry v. Super. Ct. Thurston Cnty., 92 Wash. 16, 22, 159 P. 92,

93 (1916) (emphasis added). As the judicial veto power grew, the courts justified it by claiming that they can do pre-election assessment of initiatives for “subject matter,” even though they cannot be reviewed for their “substance.” *Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119 P.3d 318 (2005). That “subject matter” versus “substance” distinction has now imploded as the Washington Supreme Court appears to have decided that all possible legal issues are available in an action to strike a local initiative from the ballot. *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 369 P.3d 140 (2016). The exception has swallowed the rule, and pre-election litigation – as the present case illustrates – is nothing short of full review of proposed legislation.²¹

“The foremost reason for restraint by the judiciary, particularly in controversies with significant political overtones, is the separation of powers inherent in our political structure.” Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U.L. REV. 695, 697 (1999).

“Justiciability constraints constitute the essence of judicial restraint” *Id.* at 707. Justiciability issues are particularly important when private interests ask the courts to interfere with the public legislative process.

[The] effort to enact a legislative proposal has consistently

²¹ Except that the initiative's challengers get to choose their hypothetical facts, rather than rely on an actual case or controversy in assessing the law's constitutionality.

been recognized by this court as a political legislative action in which courts have not interfered, nor should they. Because of the multitude of possible outcomes, the essence of the political legislative process involves many competing political choices into which courts should not intrude to act as referee.

League of Educ. Voters v. State, 176 Wn.2d 808, 831, 295 P.3d 743 (2013)

(C. Johnson, J., dissenting).²²

This Court must hold that the trial court lacked authority to review the proposed initiatives by the people of Tacoma, just as the court would have lacked authority to review a proposed ordinance by the people's representatives in the Tacoma City Council.

III. Judicial veto power over citizen initiatives is content-based discrimination of core political speech, without a compelling government interest, and thus it violates the peoples' rights enumerated in the federal First Amendment and Washington Constitution, Article I, Sections 4 and 5.²³

A. The Federal Constitution prohibits pre-enactment review of an initiative's content.

The protections guaranteed in the Fourteenth Amendment “governs any action of a state, whether through its legislature, *through its*

22 The Court's political question doctrine is also at play in pre-election initiative challenges. See *id.* at 833-34 (citing, among other cases, *State ex rel. Donohue v. Coe*, 49 Wn.2d 410, 417, 302 P.2d 202 (1956) (determination of questions arising incidental to the submission of an initiative measure to the voters is a political and not a judicial question, except when there may be express statutory or written constitutional law making the question judicial)). As noted, judicial veto is not “express statutory or written constitutional law.”

23 In 2015, the Washington Supreme Court stated that Washington courts have not “answer[ed] the question of whether subject matter, substantive, or procedural preelection review of an initiative implicates the First Amendment to the United States Constitution or article I, section 5 of our constitution.” *Huff v. Wyman*, 184 Wn.2d 643, 655, 361 P.3d 727 (2015).

courts, or through its executive or administrative officers.” *Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (emphasis added) (citations omitted). Here, the trial court's order vetoing the initiatives is a state action that must not violate the people's political rights. See *Shelley v. Kraemer*, 334 U.S. 1, 16-18 (1948).

The United States Supreme Court has held that “the circulation of a[n initiative] petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.’” *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) (footnote omitted). The *Meyer* Court rejected arguments that “the State has the authority to impose limitations on the scope of the state-created [*sic*²⁴] right to legislate by initiative,” holding instead that in the area of citizen initiative lawmaking “the importance of First Amendment protections is 'at its zenith’” and the state's burden to justify restrictions on that process is “well-nigh insurmountable.” *Id.* at 424-25.²⁵

24 Here the *Meyer* Court was referring to the initiative as a state, rather than federal, lawmaking power, thus the use of the term “state-created.” But it needs to be clarified that the right to legislate by initiative is a reserved inherent political power of the people; it is not created by the state. See *supra*, at 10-31.

25 The Plaintiffs and City cited three cases in oral argument before the trial court to attempt to counter this First Amendment argument. RP 42:21-44:22. The first two cases are not on point. The statement in *Washington State Grange v. Washington State Republican Party* that “Ballots serve primarily to elect candidates, not as forums for political expression,” was made in the context of a challenge to how the ballot listed a candidate's political party preference, and the holding was that the right of association did not include the right to use the ballot to advertise the Republican Party. 552 U.S. 442, 452 n.7 (2008) (quotation omitted). *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2012), concerned *content-neutral* signature gathering rules, which triggers a completely different First Amendment analysis than the case here,

It is irrelevant that the people may have other means to express themselves. “The First Amendment protects [the people’s] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so.” *Id.* at 424. The state infringes on the people’s core political rights when it “limits the size of the audience they can reach” or “limit[s] their ability to make the matter the focus of [jurisdiction-wide] discussion.” *Id.* at 423. “[T]he principle stated in *Meyer* is that a state that adopts an initiative procedure violates the federal Constitution if it unduly restricts the First Amendment rights of its citizens who support the initiative.” *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). Clearly, a court order that rules on the validity of proposed legislation and strikes that measure from the ballot will necessarily limit discussion of the proposed policy, and thus infringe the people’s First Amendment rights.

The courts can have a legitimate role in the initiative process, such as enforcing “nondiscriminatory, *content-neutral* limitations on the [people’s] ability to initiate legislation,” like the signature threshold for ballot placement. *Id.* at 297 (emphasis added). But here, the Plaintiffs and City make no claims that the initiatives have not properly qualified for the

where the government is restricting core political speech *precisely because of the initiatives’ content*. Finally, the third case, *City of Longview v. Wallin*, 174 Wn. App. 763, 789-792, 301 P.3d 45 (2013) dismisses the appellant’s political speech claim with scant analysis and so provides no *stare decisis* value to this Court.

ballot. Rather, the trial court, at the urging of the Plaintiffs and City, relied entirely on the *content* of the initiatives issuing an order that infringes upon the people's political rights. The signature threshold is the mechanism the people have chosen for determining which proposed initiatives will appear on the ballot. But the Washington Courts have given themselves the power to dissect the content of the proposed initiative and veto the proposal. In other words, the courts are assuming the power to restrict “core political speech” precisely *because of* the proposed initiative's content.

There is no compelling interest that could justify this infringement on the people's First Amendment rights.²⁶ The best argument the Plaintiffs and City can put forward is that the court is protecting the integrity of the initiative process by striking initiatives from the ballot that are “beyond the scope of the initiative power.” This argument only works if the First Amendment only protects speech that is “valid,” as judged by the court. But the First Amendment guarantees far more than that: “The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.” *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 625, 957 P.2d 691 (1998)

²⁶ While the argument above is focused on *Meyer*, which itself focused on political speech, the First Amendment rights of assembly and petition are also implicated here. U.S. Const., 1st Amend. (“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

(quoting *Meyer*, 486 U.S. 419) (quotation omitted). Letting a court decide which political speech is valid is antithetical to the fundamental purpose of the First Amendment.

The First Amendment is about protecting the *debate*, and does not allow for sanitizing it down to “valid” proposals through a judicial validation process. *See, e.g., id.* at 626 (“The State cannot substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.” (quotation and citation omitted)).

Even if the Plaintiffs and City do come up with a compelling interest, that interest must also be narrowly-tailored. Striking the initiative from the ballot – as the court did here – is the most extreme remedy possible, as it abolishes the political significance of the people's constitutionally-protected debate. Further, judicial review of *proposed* legislation is inherently *unnecessary*, since the people may vote it down.

The Court has no authority to police the content of proposals that the people put forward through duly-qualified initiatives. This Court must hold that the First Amendment prohibits striking an initiative from the ballot based on the initiative's content.

B. The Washington Constitution prohibits pre-enactment review of an initiative's content.

Paralleling the First Amendment's political rights protections,

Washington Constitution, article I, section 4 provides that “The right of petition and of the people peaceably to assemble for the common good shall never be abridged.” This section “appears to tend toward political, not judicial, rights.” Robert F. Utter & Hugh D. Spitzer, *THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE* 19 (2002). Section 5 provides that “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”

Political expression can only be restricted if the strict scrutiny requirements are met. *Collier v. City of Tacoma*, 121 Wn.2d 737, 854 P.2d 1046 (1993). Putting an initiative on the ballot – even a flawed initiative²⁷ – is an important act of political expression. Even if the law fails judicial review in a post-enactment challenge, the people’s vote sends an important message to elected officials. That is what political expression is all about.

Take, as an example, Tim Eyman’s notorious vehicle tax initiative that passed by 56%, but was then struck down as unconstitutional due to, among other things, a faulty ballot title. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 191-93, 11 P.3d 762 (2000). After the trial court had voided the law, but before the Supreme Court issued its affirming opinion, the legislature “paid[] homage to the ‘will of the

²⁷ By challenging the legitimacy of the courts’ jurisdiction, Defendants do not concede that the proposed initiatives at issue in this case are “invalid” or “flawed,” as argued *infra*, at 40-49.

people”²⁸ and passed a bill that put the (now void) initiative-proposed tax cut into statute. 2000 Wash. Sess. Laws 950-51, ch. 136.

In other words, that initiative served the central purpose of political expression: it influenced policy. That statute would probably not be law today, as RCW 84.36.595, had a court vetoed the initiative and prevented it from appearing on the ballot.

The fact that there are other ways to influence policy, or express political views, does not justify the judicial veto based on the initiative's content. In *Collier*, which held a Tacoma ordinance restricting political yard signs unconstitutional, the Washington Supreme Court noted that the ordinance was “particularly problematic because it inevitably favors certain groups of candidates over others. The incumbent, for example, has already acquired name familiarity and therefore benefits greatly from Tacoma's restriction on political signs. The underfunded challenger, on the other hand, who relies on the inexpensive yard sign to get his message before the public is at a disadvantage.” *Collier*, 121 Wn.2d at 752, 854 P.2d 1046. This observation applies to political expression through the initiative process as well.

Here, for example, Save Tacoma Water gathered nearly 17,000 signatures in 100 days with all volunteers and a budget of less than \$5000.

²⁸ www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2000/04/03/initiative-695-haunts-state-government-in-washington.

CP 585, ¶¶ 14-15. With that minimal budget, they would have marginal political influence without the initiative process. Their political expression concerning industrial water use in Tacoma, and the future sustainable use of Tacoma Water, continued in earnest while the initiative would appear on the ballot. When the trial court vetoed the initiative and struck it from the ballot, the court killed that political debate, and necessarily infringed on the people's constitutionally-protected political expression.

The Washington Constitution, like the United States Constitution, prohibits judicial content-based review of an initiative before it becomes law. The Court must hold that the trial court lacked authority to review these initiatives and reverse the trial court by dismissing the Plaintiffs' and City's claims and ordering the City and County Auditor to proceed with placing the initiatives onto the ballot.

IV. This initiative is within the scope of the local initiative power because it does not conflict with state or federal law, does not exercise a power delegated to the city council, and is not administrative in nature.

In a pre-election review, the general rules of statutory construction apply.²⁹ Plaintiffs and City bear a beyond a reasonable doubt

²⁹ The same general rules of statutory construction used for a statute apply when a court reviews a charter, an initiative, or an ordinance. *City of Seattle v. Auto Sheet Metal Workers Local 387*, 27 Wn. App. 669, 679-80, 620 P.2d 119 (1980) (citing *Winkenwerder v. Yakima*, 52 Wn.2d 617, 632, 328 P.2d 873 (1958)) (additional citations omitted) (applying statutory construction rules to a charter), *overruled on other grounds by City of Pasco v. Public Emps. Relations Comm'n*, 119 Wn.2d 504, 511-12, 833 P.2d 381 (1992); *Roe v. TeleTech Customer Care Mgmt. LLC*, 171 Wn.2d 736, 746, 257 P.3d 586 (2011) (citations omitted) (applying statutory construction rules to initiatives); *Am. Legion Post No. 149 v. Dept. of Health*, 164 Wn.2d 570,

burden of proof. *E.g.*, *League of Educ. Voters v. State*, 176 Wn.2d 808, 820, 295 P.3d 743 (2013) (citations omitted); *State v. Somerville*, 67 Wash. 638, 122 P. 324 (1912). The challenged law is presumed constitutional. *E.g.*, *League of Educ. Voters*, 176 Wn.2d at 818, 295 P.3d 743; *Wash. Ass'n for Substance Abuse and Violence Prevention v. State*, 174 Wn.2d 642, 654, 278 P.3d 632 (2012). “Every reasonable presumption will be made in favor of the validity of a statute.” *Paramino Lumber Co. v. Marshall*, 27 F. Supp. 823, 824 (W.D. Wash. 1939) (quotation omitted).

Multiple interpretations are resolved in favor of the law's validity. *E.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 149 Wn.2d 660, 671, 72 P.3d 151 (2003) (citations omitted); *Poolman v. Langdon*, 94 Wash. 448, 457, 162 P. 578 (1917). The court does not speculate about possible hypothetical invalid applications of a law. *See, e.g.*, *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1021 (9th Cir. 2010) (citations omitted). Instead, the law is justified by merely any valid state of facts. *E.g.*, *State v. Kitsap Cnty. Bank*, 10 Wn.2d 520, 526, 117 P.2d 228 (1941) (citation omitted).

In addition, as a first class city, Tacoma is self-governing. *E.g.*,

585, 192 P.3d 306 (2008) (citations omitted) (same); *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 392, 816 P.3d 18 (1991) (citations omitted) (applying statutory construction rules to an ordinance, including rule of construing the law “so as to uphold its constitutionality”). There is generally one statutory construction standard regardless of whether the law is local or state, or created by the people or the legislature.

City of Seattle v. Sisley, 164 Wn. App. 261, 266, 263 P.3d 610 (2011) (citation omitted). Doubt concerning the existence of power is resolved in favor of first class cities. *E.g.*, *State ex rel. Schillberg v. Everett Dist. Justice Ct.*, 92 Wn.2d 106, 108, 594 P.2d 448 (1979) (“A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated.” (citations omitted)). The court must attempt to harmonize state and local law. *E.g.*, *City of Seattle v. Wright*, 72 Wn.2d 556, 559, 433 P.2d 906 (1967) (“A state statute is not to be construed as impliedly taking away an existing power of a city of the first class if the two enactments can be harmonized.” (citing *Ayers v. Tacoma*, 6 Wn.2d 545, 554, 108 P.2d 348 (1940))).

“[T]he burden is on the challenger of an initiative proposal to show that the people's legislative authority to effectuate charter amendments is restricted.” *Maleng v. King Cnty. Corr. Guild*, 150 Wn.2d 325, 334, 76 P.3d 727 (2003). These stringent standards apply to protect the sanctity of the direct lawmaking process. “[T]he right of initiative is nearly as old as our constitution itself, deeply ingrained in our state's history, and widely revered as a powerful check and balance on the other branches of government. Accordingly, this potent vestige of our progressive era past must be vigilantly protected by our courts.” *Coppernoll*, 155 Wn.2d at 296-97, 119 P.3d 318 (citation omitted); *see*

also *State ex rel. Mullen v. Howell*, 107 Wash. 167, 170-72, 181 P. 920 (1919) (refusing “a rule of strict construction [that would apply against the people's referenda power, because] the power of the whole people is in question”).

The Plaintiffs and City brought a laundry-list of arguments against the initiatives, which the trial court adopted in full without hesitation.³⁰ But nowhere did the Plaintiffs and City' arguments rise above the beyond a reasonable doubt standard that they must achieve, and thus the trial court's injunction must be reversed.

Even under the “anything goes” judicial veto rules provided in *Spokane*, these initiatives should still go to the ballot. All the arguments against the initiatives appearing on the ballot fail:

A. The People's Right to Water Protection Initiatives are legislative, not administrative, because they create a new plan or policy.

“The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.”

³⁰ “In short, whether stated or not, the controversial nature of the particular issue may well bear upon the judicial determination of whether the matter is legislative or administrative [and thus whether the initiative is valid].” Philip A. Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55, 87 (1973) (footnote omitted).

Durocher v. King Cnty., 80 Wn.2d 139, 153, 492 P.2d 547 (1972) (quoting 5 E. McQuillin, *The Law of Municipal Corporations*, § 16.55 (3d ed. 1969 rev. vol.)) (cited in *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 11, 239 P.3d 589 (2010)).

The trial court order adopted Plaintiffs' and the City's arguments that the initiatives were administrative. CP 675.

A proposal to create a new policy where the people vote on whether large new water users may apply to Tacoma Water is clearly legislative because it makes a new policy. In contrast, for example, had this initiative sought to specifically prevent the methanol plant's water use application, that would have been administrative.

B. The People's Right to Water Initiatives do not exercise a power statutorily-delegated to the City Council.

The trial court's order summarily accepted the Plaintiffs' assertion that the initiative “involves powers delegated under RCW Title 35 to the legislative bodies of municipalities.” CP 675. However, finding a power has been delegated to the legislative body requires more specificity than citing an entire statutory title. Even where the courts have expanded this rule beyond direct reference to a statute's text, the broadest delegation has still been only a statutory chapter – not an entire title. *Whatcom Cnty. v. Brisbane*, 125 Wn.2d 345, 349, 884 P.2d 1326 (1994) (reasoning that “[u]nder the Growth Management Act, RCW 36.70A, the Legislature used

the words 'county' or 'city' interchangeably with the words 'legislative body' of the county or city. Thus, the power to act under the Growth Management Act was delegated to the 'county legislative body"). Here, this initiative is not governed by the Growth Management Act. The initiative exercises a power held by the people.

C. The initiatives do not conflict with state law.

1. RCW 43.20.260 only applies if there is a sufficient water supply, which is a tenuous assumption, and cannot be judged absent the facts from an actual water use application.

The Plaintiffs and City argued that RCW 43.20.260 limits the criteria by which a municipal water supplier can provide service, which they purport conflicts with The People's Right of Water Protection's public vote criteria for large water users. CP 178, 522-23. But that statute only applies if “the municipal water supplier has sufficient water rights to provide the water service” and “the municipal water supplier has sufficient capacity to serve the water in a safe and reliable manner” RCW 43.20.260. In light of the reality of Tacoma's actual “wet water” supply in the future, *supra* at 4-7, RCW 43.20.260 may simply not apply when a large new water user seeks to connect to Tacoma Water. If the statute is not triggered (which the court must assume is the case, as there are no facts), then there is no conflict with The People's Right to Water Protection.

2. The initiatives do not conflict with state-mandated elements of Tacoma's Comprehensive Plan.

The City claimed that Tacoma's Comprehensive Plan “commit[s] the City to provide public water service concurrent with development, including when 'development' involves serving large water users.” CP 179, 184-86. This argument is that the Comprehensive Plan conflicts with the proposed initiatives, and therefore the proposed initiatives are invalid. But while the Growth Management Act mandates certain provisions in a City's Comprehensive Plan, much of what is included in a Comprehensive Plan is not mandated by state law. *See* RCW 36.70A.070 (statute providing the “mandatory elements” of Comprehensive Plans, which does not contain the mandates the City claims it does). The Plaintiffs and City fail to show a conflict with state law here, both because they fail to show an actual conflict between the Comprehensive Plan and the proposed laws, and because they fail to show with any specificity where the particular provisions in the Comprehensive Plan that they cite are actually mandated by the Growth Management Act.

3. The initiative provisions protecting the People's Right to Water Protection from state law preemption may be protected by constitutional principles, such as the Public Trust Doctrine.

The trial court order claims that the people of Tacoma cannot protect their water supply from state laws that threaten to prevent the

people from democratically deciding the future of their water supply. CP 676, 186-89. But the people's right to protect their water supply has been recognized in recent years in international law (e.g. UN Gen. Assembly resolution 64/292, July 28, 2010) and also in ancient legal principles like the Public Trust Doctrine that carry forward to the present day. See *Caminiti v. Boyle*, 107 Wn.2d 662, 668-69, 732 P.2d 989 (1987); *Orion Corp. v. State*, 109 Wn.2d 621, 641, 747 P.2d 1062 (1987) (“Recognizing modern science's ability to identify the public need, state courts have extended the [public trust] doctrine beyond its navigational aspects.” (citations omitted)). Thus, it is entirely possible that a subsequently-enacted statute is itself invalid. Plaintiffs and City argue that the people of Tacoma cannot express their intent to protect their rights from such a state law, but Plaintiffs and City have failed to argue this point as anything beyond a theoretical concern: without concrete facts, we cannot assess whether the people's right to water is immune from preemption, or if the supposedly-preempting law is validly applied. See, e.g., *Robinson Twp. v. Pennsylvania*, 623 Pa. 564, 83 A.3d 901 (2013) (holding state oil and gas act unconstitutional as it violated the state's duty as trustee of the public's natural resources); *Juliana v. United States*, 2016 U.S. Dist. LEXIS 156014, 46 E.L.R. 20175, No. 6:15-cv-01517 (Or. D.C., Nov. 10, 2016) (refusing to dismiss a claim that the federal government

violated the people's due process rights and public trust rights by “play[ing] a significant role in creating the current climate crisis”).

4. The initiative provisions protecting the People's Right to Water Protection from corporate “rights” do not conflict with state law when they distinguish between corporations and other persons.

Similarly, the people of Tacoma express their intent that their human right to water is superior to corporate constitutional “rights,” while the Plaintiffs and City claim corporate constitutional “rights” must be held inviolate. CP 676, 188-89. Assessing the constitutionality of these provisions requires weighing the rights of the people against the purported “rights” of corporate parties that seek to violate the people's health and safety. *See generally* Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857 (2000). To do that, the Court needs facts – a case or controversy – which are lacking in this proceeding.

On the theoretical level, laws may certainly distinguish between corporations and natural persons. *E.g., Adult Entm't Ctr. v. Pierce Cnty.*, 57 Wn. App. 435, 446 n.7, 788 P.2d 1102 (1990) (collecting the “long line of cases in which the Supreme Court has held that corporations cannot claim the protection of the privileges and immunities clause of the Fourteenth Amendment” (citations omitted)). And corporations are subservient to both the people and their governments. CONST. art. XII, § 1 (“all

corporations doing business in this state may, as to such business, be regulated, limited or restrained by law”).

None of the arguments the City and Plaintiffs put before the trial court showed a beyond-a-reasonable-doubt conflict with state law. Given that many of these arguments relied on hypothetical factual circumstances (like assuming there is an adequate water supply), these arguments must fail, and a judicial veto should never have issued against these initiatives.

D. The trial court had no authority to strike valid provisions of the initiative.

Further, even if a particular sentence of the initiatives were in conflict with state law, the proper remedy should be to strike that sentence (and others that necessarily hinge on it), not the entire initiative.

“In general, if part of an initiative is within the scope of the initiative power, the governmental entity must place the valid part on the ballot.” *Priorities First v. City of Spokane*, 93 Wn. App. 406, 412, 968 P.2d 431 (1998) (citation omitted). If needed, courts can engage in extensive redaction of invalid initiative language and still order the initiative onto the ballot. *See, e.g., State ex rel. Griffiths v. Super. Ct. Thurston Cnty.*, 92 Wash. 44, 45-47, 159 P. 101 (1916).

The trial court had no authority to strike valid provisions from the proposed initiatives, regardless of whether there were invalid provisions.

Conclusion

The Court must not violate the people's fundamental political right of local community self-government. Nor may the Court violate the people's core political speech and petition rights through making content-based discrimination that does not pass strict scrutiny. In addition, the Court must restrain its review of laws proposed by the people in the same way that it withholds review of laws proposed by the people's representatives. Therefore, here, the Court should rule that courts have no authority to veto duly-qualified initiatives from the ballot, and dismiss this action for lack of subject matter jurisdiction, while ordering the City and County Auditor to proceed with putting the initiatives onto the ballot.

Arguendo, the trial court's permanent injunction was not supported by the arguments claiming that the initiatives were “beyond the scope of the initiative power” and therefore this Court should reverse the trial court's injunction and order the City and County Auditor to proceed with putting the initiatives onto the ballot.

Respectfully submitted on March 21, 2017,



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Appendix A – Complete Text of Charter Amendment 5³¹

The People's Right to Water Protection Amendment

WHEREAS, the Residents of Tacoma do not want to return to our polluted past; and

WHEREAS, since 1980, Tacoma has spent an immense amount of money, time and effort cleaning up the Superfund Sites left behind by the Asarco copper smelter, Occidental Chemical, Kaiser Aluminum and others; and

WHEREAS, City residents use almost half of the water produced by City-owned Tacoma Public Utilities; and

WHEREAS, the City of Tacoma is projecting, and preparing for, an increase in population of 127,000 more residents by 2040; and

WHEREAS, a 2009 state survey of public utilities shows that the Pierce County Large Water Users Sector is 13.7% while in King County the Large Water Users Sector is only 1.9%; and

WHEREAS, the City of Tacoma is responsible to the city's residents and small businesses first and must use all caution when issuing water utility services to any potential water user that wants to use more than one million gallons of water per day; and

WHEREAS, the Tacoma Public Utility gets water from the Green River Watershed and the concerns for the environmental impacts of large water users are valid as more increasing demands for water for people and community development must take into account droughts that will become more frequent in the Pacific Northwest as the result of climate change; and

WHEREAS, the people want policies and contractual requirements to make industry secondary to the human needs of the citizens and households, schools, hospitals, and homes for the aged, for fresh potable water should take priority except in the case of emergency fire fighting needs or any other natural disaster that cannot be reasonably forecasted; and

WHEREAS, the sustained availability of affordable and potable water for

³¹ In Clerk's Papers at 28.

the residents and businesses of Tacoma must be paramount over considerations such as potential tax revenues or investor profits; and

WHEREAS, industrial users that would require excessive amounts of water to operate will have potential long-term negative impacts on the local and regional environment and future community development in the City of Tacoma; and

WHEREAS, residents and businesses of Tacoma have been asked in the recent past and may be required in the future to conserve water; and

WHEREAS, large water users pay discounted rates while residents as ratepayers carry an extra financial burden for the conservation, maintenance, protection and development of potable water sources; and

WHEREAS, industries that use large amounts of water daily would place human, economic, environmental and homeland securities at risk; and

WHEREAS, the Citizens of Tacoma want to encourage clean and renewable energy industries operating in the City of Tacoma; and

WHEREAS, the Citizens of Tacoma find that a proposed methanol refinery does not meet the requirements of a clean, renewable and sustainable energy production facility; and

WHEREAS, the City of Tacoma Charter provides for Initiative and Referendum rights which provides the city's citizens the right to place this Charter amendment before the voters; and

WHEREAS, the people of the City of Tacoma possess an inherent and inalienable right to govern our own community as secured by the Declaration of Independence's affirmation of the right of people to alter or abolish their government if it renders self-government impossible, and this inherent right is reaffirmed in the Tacoma City Charter, the Washington State Constitution, and the United States Constitution;

Therefore be it ordained by the voters in the City of Tacoma that:

(1) The people of Tacoma adopt the following amendments to the Tacoma City Charter, Article IV (Public Utilities):

Section 4.24 – The People's Right to Water Protection

(A) People's Vote on Large Water Use Applications.

The people of the City of Tacoma find that there is a compelling need to carefully consider the consequences of providing water utility service to an applicant that intends to use large amounts of fresh water. Before providing water utility service to any applicant for 1336 CCF (one million gallons), or more, of water daily from the City, the City shall place the applicant's request for water utility service before the voters on the next available General Election Ballot, in a manner substantially conforming to the rules for Section 2.22 of this Charter. The applicant shall pay for the costs of the vote of the people. Only if a majority of the voters approve the water utility service application and all other application requirements are met may the City provide the service. The vote by the people is binding, and not advisory. Any water users currently authorized to use 1336 CCF or more of water daily are grandfathered in, however, their water utility service is not transferable.

(B) Sustainable Water Protection is an Inviolable Right that Government Cannot Infringe.

The people of the City of Tacoma protect their right to water through their inherent and inalienable right of local community self-government, and in recognition that clean fresh water is essential to life, liberty, and happiness, and the City of Tacoma has a foundational duty to maintain a sustainable provision of water for the people. The People's Right to Water Protection vote provides a democratic safeguard, on top of the City's existing application process, to ensure that large new water users do not threaten the sustainability of the people's water supply. To prevent subsequent denial of the People's Right to Water Protection by state law preemption, all laws adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of City of Tacoma only to the extent that they do not violate the rights or mandates of this Article.

(C) Water Protection supersedes Corporate Interests.

As the People's Right to Water Protection is foundational to the people's health, safety, and welfare, and must be held inviolate, no government actor, including the courts, will recognize as valid any permit, license, privilege, charter, or other authorization, that would violate the rights or mandate of this Article, issued for any corporation, by any state, federal, or international entity. In addition, corporations that violate, or seek to violate the rights and mandates of this Article shall not be deemed "persons" to

the extent that such treatment would interfere with the rights or mandates enumerated by this Article, nor shall corporations possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or mandates enumerated by this Article. “Rights, powers, privileges, immunities, and duties” shall include the power to assert international, federal, or state preemptive laws in an attempt to overturn this Article, and the power to assert that the people of the City of Tacoma lacked the authority to adopt this Article.

(D) Enforcement.

The City or any resident of the City may enforce this section through an action brought in any court possessing jurisdiction over activities occurring within the City of Tacoma, including, but not limited to, seeking an injunction to stop prohibited practices. In such an action, the City of Tacoma or the resident of the City of Tacoma shall be entitled to recover damages and all costs of litigation, including, without limitation, expert, and attorney's fees.

(2) In enacting this Charter Amendment through our Initiative Power, the people of Tacoma declare our intent that:

(A) The provisions of this Charter Amendment are severable, and the petitioners intend that all valid provisions of the initiative be placed on the ballot and enacted into law even if some provisions are found invalid.

(B) The provisions of this Charter Amendment be liberally construed to achieve the defined intent of the voters.

(C) We support each of the provisions of this section independently, and our support for this section would not be diminished if one or more of its provisions were to be held invalid, or if any of them were adopted by the City Council and the others sent to the voters for approval.

(D) This section shall take effect 15 (fifteen) days after election certification. The City shall not accept any applications for water utility service for 1336 CCF or more between the election and effective date.

Appendix B – Complete Text of Tacoma Initiative 6³²

The People's Right to Water Protection Ordinance

WHEREAS, the Residents of Tacoma do not want to return to our polluted past; and

WHEREAS, since 1980, Tacoma has spent an immense amount of money, time and effort cleaning up the Superfund Sites left behind by the Asarco copper smelter, Occidental Chemical, Kaiser Aluminum and others; and

WHEREAS, City residents use almost half of the water produced by City-owned Tacoma Public Utilities; and

WHEREAS, the City of Tacoma is projecting, and preparing for, an increase in population of 127,000 more residents by 2040; and

WHEREAS, a 2009 state survey of public utilities shows that the Pierce County Large Water Users Sector is 13.7% while in King County the Large Water Users Sector is only 1.9%; and

WHEREAS, the City of Tacoma is responsible to the city's residents and small businesses first and must use all caution when issuing water utility services to any potential water user that wants to use more than one million gallons of water per day; and

WHEREAS, the Tacoma Public Utility gets water from the Green River Watershed and the concerns for the environmental impacts of large water users are valid as more increasing demands for water for people and community development must take into account droughts that will become more frequent in the Pacific Northwest as the result of climate change; and

WHEREAS, the people want policies and contractual requirements to make industry secondary to the human needs of the citizens and households, schools, hospitals, and homes for the aged, for fresh potable water should take priority except in the case of emergency fire fighting needs or any other natural disaster that cannot be reasonably forecasted; and

WHEREAS, the sustained availability of affordable and potable water for

³² In Clerk's Papers at 31.

the residents and businesses of Tacoma must be paramount over considerations such as potential tax revenues or investor profits; and

WHEREAS, industrial users that would require excessive amounts of water to operate will have potential long-term negative impacts on the local and regional environment and future community development in the City of Tacoma; and

WHEREAS, residents and businesses of Tacoma have been asked in the recent past and may be required in the future to conserve water; and

WHEREAS, large water users pay discounted rates while residents as ratepayers carry an extra financial burden for the conservation, maintenance, protection and development of potable water sources; and

WHEREAS, industries that use large amounts of water daily would place human, economic, environmental and homeland securities at risk; and

WHEREAS, the Citizens of Tacoma want to encourage clean and renewable energy industries operating in the City of Tacoma; and

WHEREAS, the Citizens of Tacoma find that a proposed methanol refinery does not meet the requirements of a clean, renewable and sustainable energy production facility; and

WHEREAS, the City of Tacoma Charter provides for Initiative and Referendum rights which provides the city's citizens the right to place this ordinance before the voters; and

WHEREAS, the people of the City of Tacoma possess an inherent and inalienable right to govern our own community as secured by the Declaration of Independence's affirmation of the right of people to alter or abolish their government if it renders self-government impossible, and this inherent right is reaffirmed in the Tacoma City Charter, the Washington State Constitution, and the United States Constitution;

Therefore be it ordained by the voters in the City of Tacoma:

That a new Ordinance is adopted and a new section of Tacoma Municipal Code Title 12 is hereby adopted, which deals with issuing water utility service to any applicant for one million gallons, or more, of water daily

from the City of Tacoma, and is to be known as “The People's Right to Water Protection Ordinance”:

A. People's Vote on Large Water Use Applications. The people of the City of Tacoma find that there is a compelling need to carefully consider the consequences of providing water utility service to an applicant that intends to use large amounts of fresh water. Before providing water utility service to any applicant for 1336 CCF (one million gallons), or more, of water daily from the City, the City shall place the applicant's request for water utility service before the voters on the next available General Election Ballot. The applicant shall pay for the costs of the vote of the people. Only if a majority of the voters approve the water utility service application and all other application requirements are met may the City provide the service. The vote by the people is binding, and not advisory. Any water users currently authorized to use 1336 CCF or more of water daily are grandfathered in, however, their water utility service is not transferable.

B. Limitations on Government Infringement of the People's Inviolable Right of Sustainable Water Protection. The people of the City of Tacoma protect their right to water through their inherent and inalienable right of local community self-government, and in recognition that clean fresh water is essential to life, liberty, and happiness, and the City of Tacoma has a foundational duty to maintain a sustainable provision of water for the people. The People's Right to Water Protection vote provides a democratic safeguard, on top of the City's existing application process, to ensure that large new water users do not threaten the sustainability of the people's water supply. To prevent subsequent denial of the People's Right to Water Protection by state law preemption, all laws adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of City of Tacoma only to the extent that they do not violate the rights or mandates of this Ordinance.

(C) Water Protection supersedes Corporate Interests. As the People's Right to Water Protection is foundational to the people's health, safety, and welfare, and must be held inviolate, no government actor, including the courts, will recognize as valid any permit, license, privilege, charter, or other authorization, that would violate the rights or mandate of this Ordinance, issued for any corporation, by any state, federal, or international entity. In addition, corporations that violate, or seek to violate the rights and mandates of this Ordinance shall not be deemed “persons”

to the extent that such treatment would interfere with the rights or mandates enumerated by this Ordinance, nor shall corporations possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or mandates enumerated by this Ordinance. “Rights, powers, privileges, immunities, and duties” shall include the power to assert international, federal, or state preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of the City of Tacoma lacked the authority to adopt this Ordinance.

D. Enforcement. The City or any resident of the City may enforce this Ordinance through an action brought in any court possessing jurisdiction over activities occurring within the City of Tacoma, including, but not limited to, seeking an injunction to stop prohibited practices. In such an action, the City of Tacoma or the resident of the City of Tacoma shall be entitled to recover damages and all costs of litigation, including, without limitation, expert, and attorney's fees.

E. Severability and Construction. The provisions of this Ordinance shall be liberally construed to achieve the defined intent of the voters. The provisions of this Ordinance are severable, and the petitioners intend that all valid provisions of the initiative be placed on the ballot and enacted into law even if some provisions are found invalid. We – the people of Tacoma – support each of the provisions of this Ordinance independently, and our support for this Ordinance would not be diminished if one or more of its provisions were to be held invalid, or if any of them were adopted by the City Council and the others sent to the voters for approval.

F. Effect. This section shall take effect 15 (fifteen) days after either adoption or election certification. The City shall not accept any applications for water utility service for 1336 CCF or more between the adoption or election and the effective date of this Ordinance.

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COURT OF APPEALS
DIVISION II

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Declaration of Service OF WASHINGTON

I certify that on March 20, 2017, I sent a copy of the foregoing document by email to:

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